

E-Filed 08/09/2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL ALLEN HESS, et al.,

No. C 10-2224 RS

Plaintiff,

**ORDER OF DISMISSAL WITHOUT
PREJUDICE**

v.

SELECT PORTFOLIO SERVICING, INC.,
et al.,

Defendants.

On July 26, 2010, pro se plaintiffs Michael Allen Hess and Dynese Mouzakis filed a document captioned “Request for Dismissal.” They ask the Court to dismiss all claims against all defendants without prejudice. Defendants have not filed any papers either in support of or opposition to this request. Currently, the defendants have not answered the Complaint but have filed a motion for dismissal. A hearing on defendant’s motion to dismiss is scheduled for August 12, 2010 at 1:30 p.m. before the undersigned. Plaintiffs have not filed any substantive papers in opposition.

In light of the procedural posture of this case—where defendants have filed neither answer nor motion for summary judgment—the Court construes plaintiff’s “request” as a notice of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). That Rule provides

1 that “an action may be dismissed by the plaintiff without order of court (i) by filing a notice of
2 dismissal at any time before service by the adverse party of an answer or of a motion for summary
3 judgment, whichever first occurs” Fed. R. Civ. Pro. 41(a)(1)(A)(i). “Unless otherwise stated
4 in the notice of dismissal . . . , the dismissal is without prejudice. . . .” Fed. R. Civ. Pro. 41(a)(1)(B).
5 A 12(b)(6) motion to dismiss does not function as an answer, nor is it converted into a motion for
6 summary judgment without both the inclusion of materials extraneous to the complaint and some
7 affirmative conduct by the district court. *See, e.g., Swedberg v. Marotzke*, 339 F.3d 1139, 1444-46
8 (9th Cir. 2003) (affirming voluntary dismissal pursuant to Rule 41(a) where defendant’s pending
9 motion to dismiss was not construable as a motion for summary judgment). This is not the case
10 here. The Rule does not require a court order to effectuate such a notice of dismissal.

11 Accordingly, plaintiffs’ notice operates as a notice of dismissal. As there is nothing in the
12 record to indicate that the plaintiffs have “previously dismissed any federal- or state-court action
13 based on or including the same claim,” plaintiff’s dismissal is without prejudice. Fed. R. Civ. Pro.
14 41(a)(1)(B). The parties shall proceed accordingly and the clerk shall close the docket. While it
15 may go without saying, the hearing scheduled for August 12, 2010 is vacated.

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17 IT IS SO ORDERED.

18 Dated: 08/09/2010

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RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

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THIS IS TO CERTIFY THAT A HARD COPY OF THIS ORDER WAS MAILED TO:

Michael Allen Hess
2811 Abbeydale Court
Brentwood, CA 94513

Dynese Mouzakis
2811 Abbeydale Court
Brentwood, CA 94513

DATED: 08/09/2010

/s/ Chambers Staff
Chambers of Judge Richard Seeborg

* Counsel are responsible for distributing copies of this document to any co-counsel who have not registered with the Court's electronic filing system.